

COURT OF CRIMINAL APPEAL

RECORD SHEET

NATURE OF JURISDICTION: Application for extension of time to appeal against sentence imposed in the District Court (Court DCJ)

FILE NO/S: 60449/94; 60434/94

DELIVERED: Friday 10 March 1995

HEARING DATE/S: Friday 10 March 1995

PARTIES: REGINA v Manat BOPHLOM
REGINA v Sorasat TIEMTAD

JUDGMENT OF: Gleeson CJ Meagher JA Simpson J

C O U N S E L:

APPELLANT - J Papayanni

RESPONDENT - T Buddin

S O L I C I T O R S:

APPELLANT - Jeffreys and Associates (Bophlom)
Legal Aid Commission (Tiemtad)

RESPONDENT - Commonwealth DPP

RESULT: Application refused

CATCHWORDS:

SENTENCING - DISPARITY - whether basis for - co-offender had received substantially less sentence - role of co-offender found to have been much smaller than that of applicants - no error shown in this finding.

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SUPREME COURT OF NEW SOUTH WALES
FILE COPY OF JUDGMENT
TO REMAIN ON COURT FILE

**IN THE COURT OF
CRIMINAL APPEAL**

**60449/94
60434/94**

**GLEESON CJ
MEAGHER JA
SIMPSON J**

Friday 10 March 1995

**REGINA v Manat BOPHLOM
REGINA v Sorasat TIEMTAD**

SENTENCING - ALLEGED DISPARITY

The applicants, two Thai Nationals, pleaded guilty to being knowingly concerned in the importation of heroin. They were each sentenced to imprisonment for six years involving a minimum term of four years and a non parole period of two years. They had given assistance to the authorities and the sentencing judge indicated that, for such assistance, he would have imposed a head sentence of eight years.

A co-offender named Constantino, an Australian citizen who was involved in the receipt of the heroin in Australia, also pleaded guilty and was sentenced by a different judge. He received a sentence involving a head sentence of four years with a non parole period of two and a half years.

It was not suggested that the sentences imposed upon the applicants were themselves excessive or affected by any error of fact or principle. The applicants needed leave to appeal out of time, and the sole proposed ground of appeal was disparity with the sentence imposed on Constantino -

HELD -

- 1 The judge who sentenced Constantino did so on the basis of a view that his role in the transaction was substantially less than that of the present applicants.
- 2 In the light of the whole of the material it had not been shown that this appreciation was incorrect.
- 3 In those circumstances there was no disparity of a kind that should attract appellate intervention.

O R D E R S

- 1 Application for extension of time to appeal refused.
 - 2 Time to count.
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**IN THE COURT OF
CRIMINAL APPEAL**

**60449/94
60434/94**

**GLEESON CJ
MEAGHER JA
SIMPSON J**

Friday 10 March 1995

**REGINA v Manat BOPHLOM
REGINA v Sorasat TIEMTAD**

JUDGMENT

GLEESON CJ: We have before us two applications for extension of time to appeal against the severity of sentences imposed by Court DCJ in the District Court. One of the sentences, that imposed upon the applicant Tientad, was imposed on 28 October 1983, and the other sentence, that imposed upon the applicant Bophlom, was imposed on 31 March 1994.

Neither applicant sought leave to appeal against the severity of his sentence until some time after a co-offender Constantino was sentenced by Shillington DCJ in the District Court on 18 May 1994.

We have heard full argument on the merits of the proposed appeals against severity of sentence and the applications for extension of time should be dealt with in the light of the view that is formed as to the merits of the complaint made by each applicant.

Neither applicant has argued that Court DCJ made any error of law or fact or sentencing principle in the sentences which he imposed. Neither applicant desires to argue that the sentences imposed by Court DCJ were beyond the range of a proper sentencing discretion. The sole ground of

appeal which each applicant desires to pursue is that the sentence imposed by Shillington DCJ on the co-offender Constantino was so much less than the sentence that was imposed upon these two applicants that the applicants have a legitimate sense of grievance. In short, the proposed ground of appeal in each case is disparity.

That being so, it is not necessary for the purpose of these reasons to attempt fully to canvass the facts and circumstances of each case, or the reasons for sentence of Court DCJ on the one hand, and that of Shillington DCJ on the other. The important point that requires examination is the explanation that was given by Shillington DCJ, who had before him the sentences that were imposed by Court DCJ, for the substantially lighter sentence that was imposed upon Constantino.

By way of background, it suffices to say that the applicants and Constantino, and a man named Calabrese were allegedly involved in an importation of a substantial quantity of heroin from Thailand. Each of these applicants pleaded guilty to being knowingly concerned in the importation of a commercial quantity of heroin. Each applicant was sentenced by Court DCJ to imprisonment for a term of six years made up of a minimum term of four years with a non parole period of two years.

The circumstances surrounding the importation of the heroin may be summarised as follows. I do not suggest that this summary is adequate for an appreciation of the full circumstances relating to the sentencing of the applicant but it suffices for a purpose of a comparison of their sentences with that imposed upon Constantino.

During early 1993 Constantino and Calabrese, according to the Crown case, visited Thailand where they met a supplier of heroin. The heroin supplier appeared to have been closely associated with both of the applicants. The services of a female courier were engaged and she brought heroin into Australia. The two applicants travelled separately to

Australia and, following the arrival here of the courier, made arrangements with her, and both participated in the delivery of the heroin to Constantino and Calabrese. Shortly after the delivery of the heroin by the applicant to Constantino and Calabrese the police arrived and arrested all four.

Court DCJ for the purpose of sentencing the two applicants took the view that they were both rather more than carriers in relation to this importation.

Both of the applicants gave assistance to the authorities and received significant discounts from their sentences for that assistance. In each case Court DCJ indicated that, but for the assistance, he would have imposed a head sentence of eight years instead of the six years that was imposed.

As is often the case in matters of this nature the remarks on sentence of Court DCJ are expressed somewhat elliptically because of a need to avoid going into too much detail about confidential information that was given to the authorities by way of assistance. We have therefore read the remarks of Court DCJ together with and in the light of the information that was put before him as to the nature of the assistance given to the authorities by these two applicants. For present purposes it suffices to say that that information itself casts considerable light upon the role of the applicants in relation to the importation, and upon their relationship with what might be described as the head supplier in Thailand.

As I have indicated, neither applicant submits that there was anything wrong with the sentences imposed by Court DCJ as they stood at the time of their imposition. What is argued, however, is the fact that following Shillington DCJ's sentencing of Constantino there was engendered a legitimate sense of grievance and this created a disparity

which requires appellate intervention and downward adjustment of the sentences imposed by Court DCJ.

Constantino was sentenced to imprisonment for four years with a non parole period of two and a half years. The disparity is said by counsel for each applicant to be greater when one bears in mind Constantino had a bad criminal record, having previously been convicted of drug offences, and did not plead guilty until after a sentence indication.

Shillington DCJ had before him the remarks on sentence of Court DCJ and explained the differences in the sentences. In the course of his remarks on sentence in relation to Constantino he said:

"Your involvement in the matter is not altogether clear, but it is conceded by the Crown, and it does appear from the material placed before me, that you are certainly in the very lower end of the scale of involvement.

The importation involved negotiations by another person charged, Calabrese, with operators in Thailand, and you made a trip over to Thailand with Calabrese in February of last year, leaving on 23 February and returning on 13 March. There is no evidence before the Court of any acts that you did over there in furtherance of the arrangements. They were conducted by Mr Calabrese, who had negotiations apparently with principals in Thailand who arranged the importation.

The two persons involved, Tiemtad and Bophlom, have been charged and dealt with by the Court. Judge Court dealt with each of them and sentenced them to terms of imprisonment of six years with a non parole period of four years. It is clear from the remarks of his Honour that their involvement was on a much higher scale than yours.

You did some acts in Australia in furtherance of the arrangements to import these goods. You took operatives out to the airport and on the day of the arrest of yourself, Calabrese and the two persons who have been dealt with you were present at a hotel at Bondi. There is also evidence that you have made phone calls to Thailand but the details which are outlined in the statement of facts would suggest, as I have already indicated, that your involvement was of a minimal nature."

The grievance sought to be entertained by the applicants relate directly to the finding of fact that Constantino had only a minimal involvement in the transaction. That finding of fact was based upon a review of extensive material, including information given by the applicants to the authorities as to their respective dealings with Constantino and Calabrese and taped recordings of conversations between Constantino and Calabrese at a time whilst they were under police observation.

There is material in the papers, upon which I will not elaborate, especially since Calabrese has not yet come up for trial, which indicates that he is regarded by the police as a figure having a certain standing in the area in which operations of this kind took place.

There was a substantial amount of material which justified the conclusion that Constantino was in a very subservient position, vis a vis Calabrese. Constantino is a person who is by occupation, when he is employed legitimately, a labourer. He was described as being Calabrese's driver. Calabrese in one conversation with him referred to him "*as a piece of shit*" and indicated to him that he was ignorant in relation to matters relevant to this particular transaction. The evidence of the applicants was that the negotiations in Thailand, and in particular the discussion about price and quantity of heroin, were all conducted by Calabrese. Expressions that have been used in the course of argument to describe the role of Constantino have included expressions such as "*bodyguard*" or "*minder*".

Shillington DCJ, of course, had Constantino before him. His Honour appears to have based his assessment of the role in the transaction of each of these present applicants on the remarks on sentence of Court DCJ, but he also had a good deal of other information which confirmed that assessment. Court DCJ for his part was not concerned to

give any detailed assessment of the role in the transaction of Constantino, that was the task of Shillington DCJ.

It may or may not be the case that the finding of fact made by Shillington DCJ as to Constantino's role in the transaction, bound up as it was with an evaluation of Constantino's relationship with Calabrese, was somewhat favourable to Constantino. It is an evaluation that appears to have been supported by the Crown. However, I am far from persuaded that the view Shillington DCJ formed on that matter was not one that was reasonably open to him on the evidence, or that it was a view with which this court would be justified in interfering. If Shillington DCJ was correct, as I think we should accept for the purposes of this application he was, in his evaluation of the role of Constantino then, even if the sentence imposed on Constantino might be regarded as somewhat lenient, the difference between the sentence imposed on Constantino on the one hand, and those imposed on the applicants on the other, do not in my view involve a disparity of a degree which ought to attract appellate intervention.

I would propose that the application for an extension of time in each case should be refused with time to count.

MEAGHER JA: I agree.

SIMPSON J: I also agree.

GLEESON CJ: The order of the Court is as I have proposed.
